INTERGOS SPOLKA Z ORGANICZONA ODPOWIEDZIALNOSCA v. XFYRE (M) SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[ORIGINATING SUMMONS NO: BA-24NCC-28-03-2022]
3 AUGUST 2022

Abstract – *There is a total failure of consideration and a repudiatory breach of contract when a buyer, who has paid deposited money with a stakeholder, has not received any of the goods contracted for. When there is no reasonable prospect of the buyer receiving the goods from the seller in the near future, the buyer is entitled to terminate the sale and purchase agreement. It is also within the powers of the court to order the release of the stakeholder fund, especially in a situation where there is a deadlock between two contracting parties, as the arm of the law is sufficiently long to empower the court to order the release of the deposit money where it is just and fair to do so.*

CONTRACT: *Agreement – Sale and purchase agreement – Breach – Termination – Seller collected substantial amount of deposits in advance for intended sale and purchase of goods – Monies put in stakeholder's account – Seller's failure in delivering goods – Buyer claimed for refund of monies – Whether written instructions by both parties required pursuant to stakeholder agreement – Whether there was fundamental breach or repudiatory breach of contract – Whether there was total failure of consideration – Whether there was contravention of principle against unjust enrichment*

CONTRACT: *Agreement – Stakeholders agreement – Seller collected substantial amount of deposits in advance for intended sale and purchase of goods – Monies put in stakeholder's account – Seller's failure in delivering goods – Buyer claimed for refund of monies – Whether written instructions by both parties required pursuant to stakeholder agreement – Whether within powers of court to make order of release of stakeholder fund*

The present case was in regard to a seller who had collected a substantial amount of deposits in advance for the intended sale and purchase of rubber gloves, but was unable to obtain the contracted quantity of rubber gloves for delivery to the foreign buyer. The plaintiff ('Intergos') was a company in Poland, the first defendant, XFYRE (M) Sdn Bhd ('Xfyre') was a local company while the second defendant, Messrs Fahmi Zhafri Ashraf & Co ('FZAC') was a law firm named as a partnership pursuant to O. 77 r. 1 of the Rules of Court 2012 as they held USD632,000 ('monies') paid by Intergos in their stakeholder account. A sale and purchase agreement ('SPA') was entered into by Intergos, as the buyer, and Xfyre as the supplier, for the supply of 80,000 boxes of rubber gloves ('gloves') in consideration of

A USD632,000. A stakeholder agreement was also entered into where FZAC agreed to hold the USD632,000 subject to the compliance of the SPA. Pursuant to the SPA, Intergos issued an order for 80,000 boxes of gloves at a total sum of USD632,000 from Xfyre and paid the same amount to FZAC's account. Both Xfyre and FZAC admitted that FZAC received the B USD632,000 from Intergos. However, despite payment of monies and the promise to deliver the gloves, Xfyre failed in meeting the deadlines to deliver the gloves. By reason of the above breach, the parties exchanged correspondences upon which Intergos asserted that Xfyre was agreeable to mutually terminate the SPA. Since then, there was no refund received by C Intergos and there was no direct communication from Xfyre to Intergos until the date of the filing of this action. Subsequently, Xfyre, in the present suit, suggested that they never agreed to the termination of the SPA although Xfyre had not demonstrated any further intention to deliver the goods to Intergos and/or contact Intergos to dispute on the termination. Returning to FZAC, as a consequence of the termination of the SPA, Intergos required D FCAZ to release the deposit sum of USD632,000 and any accrued interests pursuant to the stakeholder agreement. The only reply from FZAC was an email stating that 'every direction to release the fund must be in writing by both sides' which included Xfyre and FCAZ. Due to the non-responsiveness of the defendants, Intergos instructed its solicitors Messrs Shearn Delamore E & Co ('SD') to issue a letter of demand to both the defendants. FZAC replied by way of email, confirming that the sum of USD632,000 remained intact and insisting that the written instructions by both parties were required pursuant to the stakeholder agreement. The issues that arose were (i) whether there was a fundamental breach or repudiatory breach of contract; F (ii) whether there was a total failure of consideration; and (iii) whether there was a contravention of the principle against unjust enrichment.

Held (allowing plaintiff's claims):

(1) The first defendant-seller repeatedly broke the contract and had either refused to perform his part of the contract or had disabled himself from G performing his part of the contract and had thereby committed repudiatory breach of the contract. Moreover, prolonged and repeated failure to deliver the contracted goods despite several extensions of time given would also be tantamount to a fundamental breach on the part of the seller. The first defendant-seller had not pleaded and had not H produced any evidence of any acquiescence on the part of the plaintiff-buyer in the first defendant-seller's continuance of the breach. On the contrary, the plaintiff-buyer kept insisting on the performance of the contract until they lost their trust in the seller and had to seek their refund of the purchase money and look for alternative supply elsewhere. I In the circumstances, the plaintiff-buyer was entitled to terminate the contract on the ground of the first defendant-seller's fundamental breach or repudiatory breach. The contemporaneous documentary evidence

also proved that the first defendant-seller by its conduct had agreed to the buyer's cancellation or termination of the SPA and the seller had agreed in principle to refund the deposited money. (paras 52 & 53)

(2) This court rejected the second defendant's argument that the instruction to release the fund had to be by both the seller and the buyer. Such an argument was contrary to the express words used in the relevant clause of the SPA and it would also defeat the very purpose of depositing the advance purchase price with a neutral party for the purposes of the SPA. The essential function of the neutral stakeholder was to hold the deposited money in trust during the transitional period pending the completion or abortion of the sale and purchase transaction. If the written consent or confirmation of both the seller and the buyer were required before the stakeholder fund could be released, the main purpose of placing the advance payment with a neutral stakeholder would be defeated because a recalcitrant and unscrupulous seller who is unable to deliver the goods would be able to sabotage or frustrate the buyer's claim for the fund after having committed the breach by refusing or failing to deliver the goods. The money would remain in the stakeholder's hands forever as long as one party does not want to give its written consent or confirmation for release, and the stakeholder would earn the interests accruing therefrom for an indefinitely long period of time. Such could not be the intention of the contractual parties here. (para 48)

(3) It is within the powers of the court to make an order of release of the stakeholder fund in the event of a deadlock between two contracting parties. The procedure of interpleader relief under the Rules of Court 2012 is made available to a stakeholder in a situation of such deadlock or dispute as to which of the opposing claimants is entitled to the release of the stakeholder fund. If the stakeholder in such deadlock situation intends to benefit from his entitlement of interests accruing from the deposited money by refusing or neglecting to apply for a stakeholder's interpleader relief for an unreasonably long period of time, the arm of the law is sufficiently long to empower the court to order the release of the deposit money where it is just and fair to do so. (para 49)

(4) The very purpose of depositing the advance purchase price with the stakeholder is to use it to exchange the delivery of the goods contracted for. With the defendant-seller's repeated failure to deliver the goods and with no evident sign of the defendant-seller's ability and readiness to deliver the goods to the plaintiff-buyer any time soon, a reasonable and commercially sensible man would look upon the sale and purchase agreement and the promised transaction as having no value at all. There had been a total failure of consideration and the plaintiff-buyer, who paid the deposited money with the stakeholder, had not received any of

A the goods contracted for and there was no reasonable prospect of the buyer receiving the goods from the seller in the near future. The plaintiff-buyer was entitled to terminate the SPA and to obtain a refund of the deposited money. (paras 56 & 57)

B **(5)** In view of the defendant's breaches and repeated failure to supply the contracted goods and its failure to produce any cogent evidence of its ability or willingness to supply and deliver the goods within reasonable time after the plaintiff's ultimatum in demand and even until the date of the hearing of the present suit, both the defendants would be enriched by the continued retention of the money, the enrichment by retaining the C plaintiff's money was at the plaintiff's expense and with no goods delivered or committed to be delivered soon, any continuation of retaining the plaintiff's money was unjust. It also contravened the principle against unjust enrichment for the first defendant-seller to lay any claim to the deposited money or for the second defendant D stakeholder to continue earning the interest by holding on to the deposited money. On the principle against unjust enrichment, the second defendant had to return the money to the plaintiff for this failed or aborted transaction. (paras 59-61)

Case(s) referred to:

E *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC* ***(refd)***
Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Stocznia Gdanska SA v. Latvian Shipping Co & Ors [1998] 1 All ER 883 ***(refd)***

F **Legislation referred to:**
Contracts Act 1950, s. 40
Rules of Court 2012, O. 77 r. 1

For the plaintiff - Koo Yin Soon & Chong Yun Xin; M/s Shearn Delamore & Co
For the defendants - Noorhafidzah Abd Rahim; M/s Mira Sham, Yong & Connie Ng

G *Reported by Suhainah Wahiduddin*

JUDGMENT

Tee Geok Hock JC:

H **Introduction**

[1] A crisis to the general population on earth became increased business opportunities for many businessmen to trade and transact in goods and products which have sudden surge in demand volumes. The recent Covid-19 pandemic is an example of such crisis which led to tremendous demands for I larger quantities of rubber gloves worldwide. Malaysia, being a top rubber gloves production country, has attracted many foreign purchasers of rubber gloves in this recent episode.

[2] The present case is a case where a seller who collected substantial amount of deposits in advance for the intended sale and purchase of rubber gloves but was unable to obtain the contracted quantity of rubber gloves for delivery to the foreign buyer.

[3] In the present case, the plaintiff-buyer sues the first defendant-seller and the second defendant-stakeholder for recovery of the advance deposit and for the following reliefs:

(i) a declaration that the first defendant had breached its obligations under the sale and purchase agreement dated 3 August 2020 ("sale and purchase agreement") for failing to deliver 80,000 boxes of disposal gloves at a total sum of USD632,000 (or its equivalent in Ringgit Malaysia on the date of judgment) or RM2,574,821.23 received by the second defendant, within 30 days from 10 February 2021 (date of the confirmation letter on payment and delivery) pursuant to cl. (g) of the sales and purchase agreement;

(ii) a declaration that the sale and purchase agreement stand terminated either by consent of both the plaintiff and the first defendant since 23 March 2021 or any such date as determined by this Honourable Court ("mutual termination") or due to the breach of the first defendant;

(iii) a declaration that the first defendant is liable to pay for the inspection fee of USD780 (or its equivalent in Ringgit Malaysia on the date of judgment) to the plaintiff or the plaintiff's solicitors within seven days from the pronouncement of the order;

(iv) the plaintiff is entitled to the release of the deposit sum of USD632,000 (or its equivalent in Ringgit Malaysia on the date of judgment) or RM2,574,821.23 from the second defendant pursuant to the stakeholder agreement dated 10 August 2020 ("stakeholder agreement") and/or in law and/or in common law;

(v) an order that the second defendant shall release the deposit sum of USD632,000 (or its equivalent in Ringgit Malaysia on the date of judgment) or RM2,574,821.23 received by the second defendant, to the plaintiff or the plaintiff's solicitors within seven days of the pronouncement of the order;

(vi) an order that the first defendant to pay the cost of and incidental to this originating summons and all costs incurred by the plaintiff; and

(vii) such further order and/or other directions as this Honourable Court deems fit and proper.

[4] By encl. 16, the originating summons was amended to make a very minor correction to the name of the defendant. The reliefs claimed and the grounds and facts in support of the claims remained the same as those stated in the original originating summons in encl. 1.

[5] On 21 June 2022, this court allowed the plaintiffs' claims and gave the following orders:

(i) order in terms of prayer (1) of the amended originating summons (encl. 16);

(ii) order in terms of prayer (2) of the amended originating summons (encl. 16) with the deletion of the words "atau apa-apa tarikh yang ditentukan oleh mahkamah yang mulia ini";

(iii) order in terms of prayer (3) of the amended originating summons (encl. 16) with the amendment of time period from seven days to 14 days;

(iv) order in terms of prayer (4) of the amended originating summons (encl. 16) with the amendment of time period from seven days to 14 days and with the clarification that the total amount to be released by the second defendant to the plaintiff shall be RM2,574,821.23 or its equivalent US Dollar as at the date of post-judgment currency conversion in compliance with this court order;

(v) order in terms of prayer (5) of the amended originating summons (encl. 16) with the amendment of time period from seven days to 14 days and with the clarification that the total amount to be released by the second defendant to the plaintiff shall be RM2,574,821.23 or its equivalent US Dollar as at the date of post-judgment currency conversion in compliance with this court order;

(vi) the first defendant shall pay the costs of action to the plaintiff in the sum of RM10,000, subject to allocator. No cost of action is awarded as between the plaintiff and the second defendant.

[6] Dissatisfied with the said decision, the defendants have appealed to the Court of Appeal.

Brief Facts

[7] The plaintiff, INTERGOS spolka z ograniczonq odpowiedzialnosciq (previously known as Przedsiebiorstwo Wielobranzowe "INTERGOS" spolka z ograniczonq odpowiedzialnosciq) ("the plaintiff"/"Intergos") is a company incorporated in Poland since 20 December 2001: see search report obtained from the National Court Register of Poland dated 15 March 2022, pp. 13 to 20, encl. 2, exh. "INTERGOS-1"

[8] The XFYRE (M) Sdn Bhd, the first defendant is a local company incorporated under Companies Act 1965 since 17 June 2013.

[9] Messrs Fahmi Zhafri Ashraf & Co, the second defendant, was at the material times a law firm registered with the Malaysian Bar Council. ("FZAC"/"the second defendant") FZAC was named as a partnership pursuant to O. 77 r. 1 of the Rules of Court 2012 as they hold the USD632,000 ("the monies") paid by Intergos in their stakeholder account. See the legal directory obtained from the Malaysian Bar website, pp. 30 to 31, encl. 2, exh. "INTERGOS-3".

[10] There are two key agreements relevant to this matter:

(i) a sale and purchase agreement dated 3 August 2020 ("SPA") entered by Intergos (buyer) and Xfyre (supplier) for the supply of 80,000 boxes of XFYRE-THERACOM SAFEGLOVE, Disposable Nitrile Gloves ("gloves") in consideration of USD632,000: see the sale and purchase agreement dated 3 August 2020 (signed on 6 August 2020), pp. 33 to 41, encl. 2, exh. "INTERGOS-4";

(ii) a stakeholder agreement dated 10 August 2020 ("stakeholder agreement") where FZAC agreed to hold the USD632,000 subject to the compliance of the SPA: see the stakeholder agreement dated 10 August 2020, pp. 48 to 51, encl. 2, exh. "INTERGOS-6" B3.

[11] Pursuant to the SPA, on 28 August 2020, Intergos issued an order for 80,000 boxes of gloves at a total sum of USD632,000 from Xfyre and this order was accepted by Xfyre *via* an Invoice No. 11770045 dated 1 September 2020. Pursuant to Xfyre's request, Intergos paid the sum of USD632,000 ("the monies") to FZAC's account, (see the purchase order dated 28 August 2020 as well as the Invoice No. I770045 dated 1 September 2020, pp. 53 to 54, encl. 2, exh. "INTERGOS-7", proof of payments dated 14 September 2020 and 2 October 2020, pp. 56 to 57, encl. 2, exh. "INTERGOS-8").

[12] Both Xfyre and FZAC admit that FZAC received the USD632,000 from Intergos. (see first defendant's admission in para. 5, encl. 5; second defendant's admission in para. 6, encl. 5).

[13] Despite the monies being fully paid on 2 October 2020, Xfyre did not immediately perform the SPA. When Intergos wrote to Xfyre on 13 January 2021 to request Xfyre to execute the delivery of the gloves, Intergos only received a confirmation letter on payment and delivery dated 10 February 2021 from Xfyre confirming receipt of payment by the legal (escrow) representative (FZAC) and that the delivery of the gloves has been rescheduled to 5 March 2021. (see letter to Xfyre for a formal call to execute the contract dated 13 January 2021 and the confirmation letter on payment and delivery dated 10 February 2021, p. 59 to 60, encl. 2, exh. "INTERGOS-9"].

[14] Based on this assurance by Xfyre, Intergos paid USD780 to SGS-CSTC Standards Technical Services (Tianjin) Co, Ltd for the SGS inspection charges on 2 March 2021. (see proof of SGS payment, p. 62, encl. 2, exh. "INTERGOS-10" B4).

[15] However, despite payment of the monies and the promise to deliver the gloves on 5 March 2021, Xfyre continued to fail in meeting the deadlines (the final deadline being 20 March 2021) to deliver the gloves, (see email from one of Intergos's deponent, Mr Marek Ficek dated 22 March 2021 to Xfyre, p. 67, encl. 2, exh. "INTERGOS11"): "Dear Mr Khamil Ismail, as agreed last week, March the 20th was the final and definite deadline for SGS inspection...". This non-delivery on 20 March 2021 was admitted by Xfyre in para. 11, encl. 5 which reads as follows:

> 11. Jika dirujuk kepada exhibit lntergos-11 pada muka surat 67, kami telah memaklumkan bahawa tarikh [baru] untuk pemeriksa adalah pada 26 dan 27 Mac 2021 untuk produk yang akan diperiksa oleh SGS China melalui email kami bertarikh 22.3.2021. Ini adalah kerana tarikh tersebut (20.3.2021) adalah bertindih dengan pemeriksaan bagi produk yang lain ...

[16] By reason of the above breach, the parties exchanged correspondences on 22 March 2021 and 26 March 2021, upon which Intergos asserts that Xfyre was agreeable to mutually terminate the SPA. See:

(i) Email from Xfyre dated 22 March 2021, p. 66, encl. 2, exh. "INTERGOS-11": "Hi Ficek, noted, I will forward this request for cancellation processing up to the management. Our accounts will summarise and notify the escrow."

(ii) Email from Xfyre dated 26 March 2021, p. 64, encl. 2, exh. "INTERGOS-11": "Hi Marek, 1. Our office is finalising the paperwork for submission on the cancellation. 2. Standard refund will be within 14 days due to the customs SST tax filing return that we have to do for this.

[17] Since then, there was no refund received by Intergos within 14 days, and there is no direct communication from Xfyre to Intergos since March 2021 until the date of the filing of this action. In fact, when Intergos issued the letter of notice of termination and demand dated 27 May 2021 to Xfyre (copying FZAC), Xfyre did not reply or contest such termination. (See plaintiff letter of termination to Xfyre dated 27 May 2021 at p. 74, encl. 2, exh. "INTERGOS-12"].

[18] It was for the first time since March 2021 (almost one year and a half) that Xfyre in para. 13 of the encl. 5 in the present suit suggested that they never agreed to the termination of the SPA although Xfyre has not demonstrated any further intention to deliver the goods to Intergos and/or contact Intergos to dispute on the termination. See para. 13, encl. 5: "13.

Saya merujuk kepada perenggan 15 afidavit sokongan tersebut dan menafikan sekeras-kerasnya dakwaan plaintif bahawa pihak kami tidak pernah bersetuju dengan penamatan perjanjian jual beli tersebut." In para. 14, encl. 7 Intergos stated that this is an afterthought by Xfyre.

[19] Returning to FZAC, as a consequence of the termination of the SPA, Intergos did on 19 April 2021 and 27 May 2021 required FZAC to release the deposit sum of USD632,000 and any accrued interests pursuant to cls. 3.5 and 3.6 of the stakeholder agreement. In this respect, the following written directions were issued, requiring FZAC to release the sum of USD632,000 and any interests accrued:

(i) letter of notice of termination and demand to FZAC dated 19 April 2021;

(ii) letter of notice of termination and demand to Xfyre (copying FZAC) dated 27 May 2021; and

(iii) letter of notice of termination and demand to FZAC (copying Xfyre) dated 27 May 2021.

(See the abovesaid letters at pp. 73 to 77, encl. 2, exh. "INTERGOS-12").

[20] The only reply from FZAC is an email dated 27 April 2021 stating that "every direction to release the fund must be in writing by both sides", which includes Xfyre and FZAC. There is no mention of other requirements. (See the abovesaid letters at p. 18, encl. 7, exh. "INTERGOS-17").

[21] There was no reply from FZAC to Intergos's letter dated 27 May 2021. B5. Efforts made by Intergos to establish communication with the defendants to recover the USD632,000 (May 2021 to December 2021).

[22] Due to the non-responsiveness of the defendants, Intergos instructed its solicitors Messrs Shearn Delamore & Co ("SD") to issue a letter of demand to both the defendants.

[23] As for FZAC, FZAC only replied by way of email to SD on 1 December 2021 (after two follow-ups by SD on 26 November 2021 and 1 December 2021), confirming that the sum of USD632,000 remains intact and insisting that the written instructions by both parties are required pursuant to cl. 3.5 of the stakeholder agreement. Most pertinently, at that time, FZAC did not claim that the letters dated 19 April 2021 and 27 May 2021 were not received by them. (See the letter of demand dated 19 November 2021 at p. 79, encl. 2, exh. "INTERGOS-13"; see the follow up emails at p. 83 and 85, encl. 2, exh. "INTERGOS-13": see reply letter from FZAC at pp. 88 to 93, encl. 2, exh. "INTERGOS-14".

Analysis And Conclusions

[24] This court finds that the money deposited with the second defendant as the stakeholder was meant to be the advance purchase price deposited with a neutral third person and intended to be for the sale and delivery of

disposable medical nitrite gloves under the sale and purchase agreement dated 2 August 2020 ("SPA") between the first defendant (as the seller) and the plaintiff (as the purchaser). This purpose of the deposit with the stakeholder is inherent in the very nature of stakeholder money in a sale and purchase transaction involving advance deposit between erstwhile strangers and is also evident from express clauses of the SPA here.

[25] Clause 9(j) of the SPA stipulates that "the deposit will be offset against final delivery or returned to the buyer upon contract termination or completion after the clearance of any outstanding charges": exh. "Intergos-4" to the plaintiff's affidavit-in-support (encl. 2).

[26] Clause 11 of the SPA provides that if the seller is prevented by force majeure from executing the contract, the seller shall notify the buyer immediately. If the effect of the force majeure continues for more than three days, the buyer shall have the right to cancel the contract and the seller shall refund all paid amount to the buyer: exh. "Intergos-4" to the plaintiff's affidavit-in-support (encl. 2);

[27] Pursuant to the mutual agreement of the seller and the buyer that all payments under the SPA be held by a neutral party, from which payment to the parties in contract including the fees and expenses of the neutral party will be met: cl. 2.2 of the stakeholder agreement dated 10 August 2020 signed between the second defendant (as stakeholder), the plaintiff (as buyer) and the first defendant (as seller): exh. "Intergos-6" to the plaintiff's affidavit-in-support (encl. 2).

[28] Clause 3.1 of the stakeholder agreement provides that the buyer in contract agrees to pay the neutral party the sum of USD632,000 ("the fund") to be held on the terms of this agreement. (exh. "Intergos-4" to the plaintiff's affidavit-in-support (encl. 2)).

[29] Clause 3.3 of the stakeholder agreement provides that "the fund will be held by the neutral party in the stakeholder account until a direction in writing is received under the contract as to its payment',

[30] Clause 3.5 of the stakeholder agreement provides that "every direction to the neutral party for payment from funds held in the stakeholder account must be: (a) in writing; (b) accompanied by a copy of the invoice or invoices rendered to the parties in order to identify the fees and expenses for which the neutral party requires payment; and (c) copied to the parties.

[31] Clause 3.11 of the stakeholder agreement provides that "the neutral party shall be entitled to retain all interest earned in respect of the monies held in the stakeholder account and to transfer such interest to its own bank account at such time or times as interest is credited to the stakeholder account by the bank".

[32] The plaintiff-buyer sent a purchase order dated 28 August 2020 to the first defendant-seller for 80,000 boxes of disposable medical nitrite gloves for a total price of USD632,000: exh. "Intergos-7" to the plaintiff's affidavit-in-support (encl. 2).

[33] The first defendant-seller issued an invoice dated 1 September 2020 to confirm the sale and purchase for USD632,000 and the terms of delivery were stipulated as "terms & conditions as per signed S&R exh. "Intergos-8" to the plaintiff's affidavit-in-support (encl. 2). Under cl. 7 of the SPA, the seller shall finalise preparation for loading within 30 days of each monthly shipment: sub-cl. 7(b); the earliest delivery can be made within 14 days from payment clearance subject to the seller's discretion (sub-cl. 7b); standard lead time to the first shipment: 30 days (sub-cl. 7c); the first shipment/complete preparation is within 30 days from the payment clearance or confirmation letter from escrow (sub-cl. 7g).

[34] The plaintiff remitted two tranches of USD316,000 totalling USD632,000 to the second defendant's CIMB account No. 8007326197 on 14 September 2020 and 2 October 2020: exh. "Intergos-8" to the plaintiff's affidavit-in-support (encl. 2).

[35] From the terms of the SPA and the purchase order and invoice, it is clear that loading of the goods for shipment shall be made by the seller within 30 days of the receipt of payment in the stakeholder account or confirmation letter from escrow. The loading of the goods should therefore be done by 1 November 2020.

[36] After the first defendant failed to deliver the goods within the stipulated time, the plaintiff by letter dated 13 January 2021 made a formal call to perform the contract and also asked the first defendant – seller to provide clear and binding information as to when the delivery will be executed: exh. "Intergos-9" to the plaintiff's affidavit-in-support (encl. 2).

[37] By letter dated 10 February 2021, the first defendant-seller confirmed that they had received the payment confirmation from the legal (escrow), *ie*, the stakeholder, and also notified that the delivery of 80,000 boxes of gloves has been rescheduled to 5 March 2021: exh. "Intergos-9" to the plaintiff's affidavit-in-support (encl. 2).

[38] On 2 March 2021, the plaintiff-buyer remitted USD780 to SGS-CSTC standards technical services for the fees in respect of the intended inspection of quality of goods in preparation for shipment of the goods: exh. "Intergos-10" to the plaintiff's affidavit-in-support (encl. 2).

[39] When the first defendant-seller still failed to notify or arrange the place and appointment for inspection of goods by 4 March 2021, the plaintiff-buyer was convinced that no goods was available or ready for inspection or shipment. By a series of emails dating from 4 March 2021, the plaintiff-buyer began to ask for refund of the money. See exh. "Intergos-11" to the plaintiff's affidavit-in-support (encl. 2).

[40] From the other exhibits and also the emails in exh. "Intercargos-11", it is established that:

(i) the original contractual due date for delivery of the 80,000 boxes of gloves was first November 2020;

(ii) the first defendant-seller was in breach of SPA in failing to deliver any of the ordered goods within 30 days of payment receipt by the stakeholder;

(iii) the first defendant-seller postponed the delivery dates severally times due to its lack of readiness to deliver the goods;

(iv) after several postponements, the plaintiff-buyer lost its patience with and trust in the first defendant-seller and on 4 March 2021 the plaintiff-buyer asked for refund of money;

(v) the first defendant-seller's representative promised to refund the money after the refund request has been processed by the seller's accounts department; and

(vi) the first-defendant seller's representatives by conduct agreed to the plaintiff-buyer's suggestion to cancel the contract in the SPA.

[41] By letter dated 19 April 2021, the plaintiff demanded the second defendant – stakeholder for refund of the deposited money on ground of the termination of contract due to the first defendant-seller's repeated failure to deliver the goods. A formal written letter of termination of contract was issued by the plaintiff-buyer on or about 27 May 2021 to the first defendant-seller and copied to the second defendant-stakeholder. See exh. "Intergos-12" to the plaintiff's affidavit-in-support (encl. 2).

[42] By email dated 27 April 2021, the second defendant-stakeholder argued that cl. 3.5 of the stakeholder agreement required every direction to release the fund to be in writing by both the seller and the buyer and asked the plaintiff to obtain the refund instruction from the first defendant-seller: exh. "Intergos-17" to the plaintiff's affidavit-in-reply (encl. 7).

[43] By letter dated 19 November 2021, the plaintiff-buyer's solicitors demanded the second defendant-stakeholder to refund the deposited money totalling USD632,000 to the plaintiff as the SPA has been terminated: exh. "Intergos-13" to the plaintiff's affidavit-in-support (encl. 2).

[44] By letter dated 1 December 2021, the second defendant-stakeholder confirmed that the deposited money totalling RM2,574,821.23 (equivalent to USD632,000 at the material times) is still kept in their stakeholder account, and that Mr Khamil, the CEO of the first defendant-seller, confirmed that the seller's contention was that some of the product has been received by a company called Simfoni Jumaira: exh. "Intergos-14" to the plaintiff's affidavit-in-support (encl. 2). However, there is no documentary evidence adduced to substantiate such an allegation or contention. There is

also no evidence to substantiate the connection between Simfoni Jumaira and the plaintiff-buyer or that the delivery to Simfoni Jumaira was in any way agreed by Intergos as part of the delivery contracted under the SPA of Intergos.

[45] By letters dated 19 November 2021 and 29 November 2021 the plaintiff's solicitors demanded that the first defendant-seller shall cause to be paid to the plaintiff the USD632,000: exh. "Intergos-15" to the plaintiff's affidavit-in-support (encl. 2).

[46] When there was no response from the first defendant nor any refund from the second defendant, the plaintiff filed this suit in March 2022.

[47] From the evidence adduced, the first defendant-seller has not demonstrated produced any document or evidence to prove any of the following allegations and/or matters:

(i) the 80,000 boxes of gloves have allegedly been manufactured/produced;

(ii) the 80,000 boxes of gloves were allegedly stored in Malaysia – the production date and storage costs were not provided to Intergos or to this court;

(iii) the 80,000 boxes of gloves were allegedly delivered to the airport/seaport Malaysia – there is no documentary evidence evidencing the same;

(iv) any approval from Malaysian authorities to export the 80,000 boxes of gloves to China/Poland – no evidence of approval was provided by the seller;

(v) the 80,000 boxes of gloves were allegedly delivered to China – the delivery date and costs were not provided to Intergos or to this court;

(vi) the 80,000 boxes of gloves had ever obtained clearance from China Authorities to be landed in the airport/seaport in China there is no documentary evidence from the Chinese Government evidencing the same; or

(vii) the 80,000 boxes of gloves are allegedly currently in China – no invoice for the storage costs and no photographs of the alleged goods was provided by the seller.

[48] This court rejects the second defendant's argument that the instruction to release the fund has to be by both the seller and the buyer. Such an argument is contrary to the express words used in the relevant clause of the SPA and it would also defeat the very purpose of depositing the advance purchase price with a neutral party for the purposes of the SPA. The very purpose of depositing the advance purchase price with the neutral stakeholder is to ensure that:

(i) in the event the goods were duly delivered in proper conditions to the buyer, the seller by his own letter, accompanied by the proper documentation but without any written consent or confirmation from the buyer, can made a demand on the deposited money and obtain its release as the purchase consideration for the goods delivered; and

(ii) in the event the goods are not delivered at all, the seller by its own letter, accompanied by the proper documentation but without any written consent or confirmation from the seller, can made a demand for its refund.

The essential function of the neutral stakeholder is to hold the deposited money in trust during the transitional period pending the completion or abortion of the sale and purchase transaction. If the written consent or confirmation of both the seller and the buyer are required before the stakeholder fund can be released, the main purpose of placing the advance payment with a neutral stakeholder would be defeated because:

(i) a recalcitrant and unscrupulous buyer who has received the goods in fine condition would be able to sabotage or frustrate the seller's claim for the fund after having properly delivered the goods; and

(ii) a recalcitrant and unscrupulous seller who is unable to deliver the goods would be able to sabotage or frustrate the buyer's claim for the fund after having committed the breach by refusing or failing to deliver the goods.

In either of situation (i) or situation (ii), the money in the money would remain in the stakeholder's hands forever as long as one party does not want to give its written consent or confirmation for release and the stakeholder would earn the interests accruing therefrom for an indefinitely long period of time. This court finds that such cannot be the intention of the contractual parties here.

[49] In the unlikely event that the mutual written consent or confirmation of both contracting parties are required before a neutral third person holding the stakeholder fund can release the fund to either of the contracting party, it would still be within the powers of the court to make an order of release of the stakeholder fund in the event of a deadlock between the two contracting parties. The procedure of interpleader relief under the Rules of Court 2012 is made available to a stakeholder in situation of such deadlock or dispute as to which of the opposing claimants is entitled to the release of the stakeholder fund. If the stakeholder in such deadlock situation intends to benefit from his entitlement of interests accruing from the deposited money by refusing or neglecting to apply for a stakeholder's interpleader relief for an unreasonably long period of time, the arm of the law is sufficient long to empower the court to order the release of the deposit money where it is just and fair to do so.

Fundamental Breach Or Repudiatory Breach

[50] Section 40 of the Contracts Act 1950 stipulates that; "When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

[51] In *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464 the Federal Court held that "the right of an innocent party to terminate a contract or treat itself as having been discharged from the contract is mainly premised on the grounds of repudiation or fundamental breach."

[52] From the evidence adduced, the court finds that the first defendant-seller repeatedly broke the contract and has either refused to perform his part of the contract or has disabled himself from performing his part of the contract and has thereby committed repudiatory breach of the contract. Moreover, prolonged and repeated failure to deliver the contracted goods despite several extensions of time given would also be tantamount to a fundamental breach on the part of the seller. This court also finds that the first defendant-seller has not pleaded and has not produced any evidence of any acquiescence on the part of the plaintiff-buyer in the first defendant-seller's continuance of the breach. On the contrary, the evidence shows that the plaintiff-buyer kept insisting on the performance of the contract until they lost their trust in the seller and have to seek their refund of the purchase money and look for alternative supply elsewhere. In the circumstances, the plaintiff-buyer was entitled to terminate the contract on ground of the first defendant-seller's fundamental breach or repudiatory breach.

[53] This court also finds that the contemporaneous documentary evidence proves that the first defendant-seller by its conduct has agreed to the buyer's cancellation or termination of the SPA and the seller has agreed in principle to refund the deposited money.

Total Failure Of Consideration

[54] Another ground for the claim relied upon by the plaintiff-buyer is total failure of consideration.

[55] The Federal Court has decided on the law relating to total failure of consideration. The Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 affirmed Lord Geof of Chieveley's statement in *Stocznia Gdanska SA v. Latvian Shipping Co & Ors* [1998] 1 All ER 883 that:

> ... failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract, but rather whether the promisor has performed any party of the contractual duties in respect of which payment is due.

The Federal Court in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464 clarified on the question of total failure of consideration as follows:

> [60] In fact in *Berjaya Times Square Sdn Bhd*, it did not rule as wrong the conclusions in the cases which allowed termination of the respective contracts on the ground that there was failure to complete the contractual works (see *Tan Yang Loong & Anor v. Newacres Sdn Bhd* [1992] 1 MLJ 289; *Chye Fook v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308; *Law Ngei Ung v. Tamansuri Sdn Bhd* [1989] 2 CLJ 44 (Rep); [1989] 2 CLJ 181) As such the principle should therefore be this. *There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part*. In the earlier instance, there is a right to terminate the contract, but not in the latter instance. (emphasis added)

[56] In our present case, the very purpose of depositing the advance purchase price with the stakeholder is to use it to exchange the delivery of the goods contracted for. With the defendant-seller's repeated failure to deliver the goods and with no evident sign of the defendant-seller's ability and readiness to deliver the goods to the plaintiff-buyer any time soon, a reasonable and commercially sensible man would look upon the sale and purchase agreement and the promised transaction as having no value at all.

[57] From the evidence adduced, this court also finds that there has been a total failure of consideration and the plaintiff-buyer, who paid the deposited money with the stakeholder and has not received any of the goods contracted for and there is no reasonable prospect of the buyer receiving the goods from the seller in the near future. In the circumstances, the plaintiff-buyer is entitled to terminate the SPA and to obtain a refund of the deposited money: see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 (Federal Court).

Unjust Enrichment

[58] In *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, the Federal Court comprehensively considered the issue of what are the principles of unjust enrichment that are applicable under Malaysian law (see [118]). In *Dream Property* case, the Federal Court alluded at [117] and [119] the requirements for establishing that there is a right to restitution arising out of unjust enrichment if the following elements can be demonstrated: (a) the other party must have been enriched; (b) this enrichment was at the expenses of the claimant; (c) the retention of the benefit by the other party would be unjust; and (d) Whether there are any special defences?

[59] In the circumstances of the present case, this court finds that in view of the defendant's breaches and repeated failure to supply the contracted goods and its failure to produce any cogent evidence of its ability or willingness to supply and deliver the goods within reasonable time after the plaintiff's ultimatum in demand and even until the date of hearing of the present suit, both the defendants would be enriched by the continued retention of the money, the enrichment by retaining the plaintiff's money is at the plaintiff's expense and with no goods delivered or committed to be delivered soon, any continuation of retaining the plaintiffs money is unjust.

[60] In the circumstances, it also contravenes the principle against unjust enrichment for the first defendant-seller to lay any claim to the deposited money or for the second defendant-stakeholder to continue earning the interest by holding on to the deposited money.

[61] On the principle against unjust enrichment, the second defendant has to return the money to the plaintiff for this failed or aborted transaction.

Conclusion

[62] In the premises, this court on 21 June 2022 held that the plaintiff is entitled to the declaratory reliefs prayed for and also the refund of the deposited money.

[63] Hence, this court made the orders as follows:

(i) order in terms of prayer (1) of the amended originating summons (encl. 16), *ie*, a declaration that the first defendant had breached its obligations under the sale and purchase agreement dated 3 August 2020 ("sale and purchase agreement") for failing to deliver 80,000 boxes of disposal gloves at a total sum of USD632,000 (or its equivalent in Ringgit Malaysia on the date of judgment) or RM2,574,821.23 received by the second defendant, within 30 days from 10 February 2021 (date of the confirmation letter on payment and delivery) pursuant to cl. (g) of the sales and purchase agreement;

(ii) order in terms of prayer (2) of the amended originating summons (encl. 16) with the deletion of the words "atau apa-apa tarikh yang ditentukan oleh mahkamah yang mulia ini", *ie*, a declaration that the sale and purchase agreement stand terminated either by consent of both the plaintiff and the first defendant since 23 March 2021 or due to the breach of the first defendant;

(iii) order in terms of prayer (3) of the amended originating summons (encl. 16) with the amendment of time period from seven days to 14 days, *ie*, a declaration that the first defendant is liable to pay for the inspection fee of USD780 (or its equivalent in Ringgit Malaysia on the date of judgment) to the plaintiff or the plaintiff's solicitors within 14 days from the pronouncement of the order;

(iv) order in terms of prayer (4) of the amended originating summons (encl. 16) with the amendment of time period from seven days to 14 days and with the clarification that the total amount to be released by the second defendant to the plaintiff shall be RM2,574,821.23 or its equivalent US Dollar as at the date of post-judgment currency conversion in compliance with this court order, *ie*, the plaintiff is entitled to the release of the deposit sum of RM2,574,821.23 (or its equivalent US Dollar as at the date of post-judgment currency conversion in compliance with this court order) from the second defendant pursuant to the stakeholder agreement dated 10 August 2020 ("stakeholder agreement") and/or in law and/or in common law within 14 days from the date hereof;

(v) order in terms of prayer (5) of the amended originating summons (encl. 16) with the amendment of time period from seven days to 14 days and with the clarification that the total amount to be released by the second defendant to the plaintiff shall be RM2,574,821.23 or its equivalent US Dollar as at the date of post-judgment currency conversion in compliance with this court order, *ie*, an order that the second defendant shall release the deposit sum of RM2,574,821.23 (or its equivalent US Dollar as at the date of post-judgment currency conversion in compliance with this court order) received by the second defendant, to the plaintiff or the plaintiff's solicitors within 14 days of pronouncement of the order;

(vi) the first defendant shall pay the costs of action to the plaintiff in the sum of RM10,000, subject to allocator. No cost of action is awarded as between the plaintiff and the second defendant.

[64] The judgment sum herein is pegged to Ringgit Malaysia as the USD equivalent was converted by the second defendant in year 2020 at the then exchange rate into RM2,574,821.23 and it is unfair or unjust for the second defendant-stakeholder to shoulder the risks or enjoy the benefit of any fluctuations in the foreign exchange rates between the date of actual original currency conversion in year 2020 and the date of post-judgment currency conversion at the time of refund in year 2022.